No. 09-1571

JUL 23 2010

In The
Supreme Court of the United States

DALE McALARY and PEARL McALARY,

Petitioners,

vs.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA DEPARTMENT OF HUMAN SERVICES; HOWARD HENDRICK, Director of Oklahoma Department of Human Services; OKLAHOMA HEALTH CARE AUTHORITY; MIKE FOGARTY, Director of Oklahoma Health Care Authority; HOWARD HENDRICK, Individually; AND GERRY MOORE, Individually,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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THE PARTIES

Respondents are the state agencies which operate Oklahoma's Medicaid Program and the chief executives of those agencies. The respondents named in their individual capacities, Howard Hendrick and Gerry Moore, were dismissed from the case before judgment was granted by the trial court.

Petitioners are a married couple who both live in a nursing home and have applied for Medicaid to pay for their care. Petitioner Dale McAlary died before the administrative hearing.

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THE FACTS

This case hinges on the way Respondent Oklahoma Department of Human Services (hereafter "OKDHS") treated the corpus of a trust benefitting Petitioners when determining if the Oklahoma Medicaid program would pay for their nursing home care.

Petitioners are a married couple who both moved to a nursing home on January 2, 2008. They owned Medicaid-countable resources totaling $178,030.

On January 8, 2008, Petitioners' daughter (hereafter "Daughter") created the McAlary Family Trust (hereafter "Trust") and named herself as trustee. In the Trust document, Daughter stated that it was her wish that the corpus and income be managed for Petitioners' benefit during their lifetimes. The Trust also gives Daughter the authority to use the entire corpus and income for the benefit of Petitioners at any time. Daughter also had the power to revoke the Trust.

On page 13 of their Petition, Petitioners state as a fact that Daughter did not establish the Trust at the direction or request of Petitioners. This is merely Petitioners' assertion, and was not found to be a fact at any level of the administrative and judicial proceedings. In fact, Daughter did not testify at the administrative hearing, so there is no evidence from her regarding her intention other than the bare language of the Trust.

On January 21, 2008, Daughter, in her capacity as attorney-in-fact for Petitioners, transferred $178,030 of their money and property to the Trust. In return, Daughter, as trustee, gave Petitioners a promissory note (hereafter "the Note"). The Note said that the Trust would repay the $178,030, plus 4% interest, in six yearly installments of $29,671.76, beginning on January 8, 2009. The Note was unsecured and contained the provision:

> This is a non-recourse note. Notwithstanding anything to the contrary in this note, the Borrower shall not have any personal liability for payment of this note or any sums due hereunder, and the Lender and all subsequent holders shall look solely to the payments hereunder for payment and satisfaction of all sums due under this note.

OKDHS received Petitioners' applications for Medicaid on February 4, 2008. As required by 42 U.S.C. § 1396a and Oklahoma Administrative Code (hereafter "OAC") 317:35-19-21(2), half of the $178,030, ($89,015) was attributed to each Petitioner. On March 18, 2008, OKDHS denied both applications because each Petitioner had resources that were forty times greater than the $2,000 Medicaid limit.

Petitioners appealed the denials by asking for an administrative hearing. At the hearing, Petitioners presented evidence that the Note could not be sold because it was not given in an arms-length transaction and could not be enforced in case of default. Petitioners claimed that because the Note could not

be sold, it had no value for purposes of determining Medicaid eligibility.

The hearing decision was unfavorable to Petitioners. Pursuant to state law, Petitioners then asked for review by Respondent Hendrick in his official capacity as Director of OKDHS. Respondent Hendrick issued a decision based on 42 U.S.C. § 1396p(d) and OAC 317:35-5-41.6(5) – which incorporates the federal law. 42 U.S.C. § 1396p(d) and OAC 317:35-5-41.6(5) say that the corpus of a trust is available to a Medicaid applicant if the applicant established the trust and funded it with their money. 42 U.S.C. § 1396p(d)(2) and OAC 317:35-5-41.6(5)(A) say that an individual is considered to have "established" a trust if it was created by the applicant; someone acting at the applicant's direction; or by someone who had the legal authority to act for the applicant. Respondent Hendrick found that Daughter "established" the Trust for Petitioners and funded it with their money. Therefore, according to 42 U.S.C. § 1396p(d) and OAC 317:35-5-41.6(5), the Trust corpus constituted an available resource for Petitioners and made them ineligible for Medicaid. Respondent Hendrick's decision constituted the final administrative decision in the case.

As allowed by state law, Petitioners appealed Respondent Hendrick's decision to the District Court for Dewey County, Oklahoma. The district court found in favor of Petitioners, without making findings of fact or conclusions of law.

Respondents appealed the district court decision to the Oklahoma Supreme Court which, pursuant to Oklahoma Supreme Court Rule 1.24, assigned the case to the Oklahoma Court of Civil Appeals for review.

On December 31, 2009, the Oklahoma Court of Civil Appeals issued a decision reversing the district court decision. The reversal hinged on the deference that Oklahoma law requires to be given to findings in the administrative decision being reviewed. See Petitioners' Appendix, pgs. 8-9. Respondent Hendrick's critical finding was that the Trust had been "established" by Daughter on behalf of Petitioners, as the term is used in 42 U.S.C. § 1396p(d)(1) and OAC 317:35-5-41.6(5). Following Oklahoma law, the Court of Civil Appeals gave deference to this administrative finding because there was substantial evidence to support it. Once it was determined that Daughter established the Trust, 42 U.S.C. § 1396p(d) and OAC 317:35-5-41.6(5) dictated that the Trust corpus was to be treated as an available resource to Petitioners. See Petitioners' Appendix, pgs. 15-16. The Court then concluded that both Petitioners had resources well in excess of the $2,000 Medicaid limit and OKDHS had acted correctly in denying their applications.

The Oklahoma Court of Civil Appeals decision contains a block quote setting forth the language of OAC 317:35-5-41.6(5)(A), which follows 42 U.S.C. § 1396p(d)(1)(A) word-for-word. See Petitioners' Appendix, pgs. 13-14.

Petitioners then asked for review of the Oklahoma Court of Civil Appeals decision by filing a Petition for Writ of Certiorari with the Oklahoma Supreme Court. On March 29, 2010, the Oklahoma Supreme Court denied the Petition.

Petitioners filed their *Petition for a Writ of Certiorari* in this Court on June 26, 2010. For the second time, counsel for Petitioners have cited a non-existent statute, 42 U.S.C. § 1257, as giving this Court jurisdiction. See *Daily et ux. v. Oklahoma, et al*., 09-1095.

GRANT OF CERTIORARI IS NOT WARRANTED

The question that Petitioners present for review is, "Whether a Trust created for the benefit of the Plaintiffs by their daughter is an 'available resource' for Plaintiffs in determinations of their eligibility for Medicaid benefits?" Petitioners claim, "Review is warranted because the opinion of the Oklahoma Court of Appeals as to the availability of the trust is contrary to federal Medicaid law."

The question that Petitioners present for review does not fit within the criteria of Supreme Court Rule 10(a) because no decision by a United States Court of Appeals is involved.

Likewise, Petitioners do not claim that the decision of the Oklahoma Court of Civil Appeals is in conflict with a decision made by another court. In

fact, Petitioners cite no decisions that deal with facts similar to those presented in this case. Therefore, Petitioners cannot claim that their request for certiorari comes within the ambit of Supreme Court Rule 10(b).

Petitioners claim that, "Review is warranted because the opinion of the Oklahoma Court of Appeals as to the availability of the trust is contrary to federal Medicaid law." Although not stated, this appears to be a claim that certiorari should be granted pursuant to Supreme Court Rule 10(c), which says:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Although Petitioners say that the question presented is an important question of federal law, they present no argument to support the claim. Instead, Petitioners argue that the Oklahoma Court of Civil Appeals incorrectly concluded that, for purposes of 42 U.S.C. § 1396p(d)(1) and OAC 317:35-5-41.6(5), Daughter "established" the Trust for Petitioners. This conclusion is important because if Daughter "established" the trust, then the Trust corpus is an available resource to Petitioners and makes them ineligible for Medicaid.

In finding that Daughter established the Trust, the Court of Civil Appeals first reviewed the evidence that supported Respondent Hendrick's finding:

> The Trust was established by Daughter. Evidence that Daughter acted on behalf of McAlarys as their attorney in fact includes Daughter's statement in Article III of the Trust that her primary purpose in establishing the Trust was to provide funds to be spent on behalf of McAlarys, and it was her intention to benefit McAlarys to the fullest extent possible rather than the remainder beneficiaries. Additionally, within just two weeks of establishing the Trust, it was funded by $178,030 of McAlarys' own money and property (on January 21, 2008). Furthermore, just one day after the $178,030 was placed in the Trust (on January 22, 2008), McAlarys applied for Medicaid. The administrative agency found that when Daughter established the Trust, she was acting on behalf of McAlarys as their attorney in fact.

Petitioners' Appendix, pg. 15.

The Oklahoma Court of Civil Appeals then explained why it was required to accept Respondent Hendrick's finding that the Trust was "established" by Daughter:

> In view of the "reliable, material, probative and substantial competent evidence" in the record, this finding is not clearly erroneous. 75 O.S.2001 § 322(I)(e). Therefore, since the

> record supports the finding that Daughter acted on behalf of McAlarys, we must consider McAlarys to have established the Trust OAC 317:35-5-41.6(5). We must accord great deference to the factual findings and conclusions of an administrative agency. 75 O.S. 2001 § 322(1)(e); *Board of Examiners of Veterinary Medicine v. Mohr*, 1971 OK 64, 485 P.2d 235. Even if competent evidence exists in opposition to a factual finding, this Court is not entitled to substitute its judgment for that of the agency as to the weight of the evidence. *Id.* Moreover, we must accord great weight to the expertise of an administrative agency. *City of Hugo v. State of Oklahoma ex rel. Public Employees Relations Board*, 1994 OK 134, 886 P.2d 485.

Petitioners' Appendix, pgs. 15-16.

Thus, the decision of the Oklahoma Court of Civil Appeals rests on the deference that Oklahoma law requires it to give to Respondent Hendrick's finding that Daughter "established" the Trust for purposes of 42 U.S.C. § 1396p(d)(1) and OAC 317:35-5-41.6(5).

Petitioners argue that the Oklahoma Court of Civil Appeals incorrectly applied 42 U.S.C. § 1396p(d)(1) when it concluded that Daughter established the Trust. This is not true. What the Oklahoma Court of Civil Appeals did was conclude that the finding by Respondent Hendrick that Daughter established the Trust was not "clearly erroneous", and therefore it was required to accept his determination.

Even if Petitioners are correct in stating that the Oklahoma Court of Civil Appeals incorrectly applied 42 U.S.C. § 1396p(d)(1), the argument amounts to a claim that the Oklahoma Court of Civil Appeals made erroneous findings of fact or misapplied a properly stated rule of law. There is no claim that the Oklahoma Court of Civil Appeals actually misstated the law. Therefore, the question Petitioners seek to have reviewed falls into the last sentence of Supreme Court Rule 10, which says, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

CONCLUSION

For the foregoing reasons, the *Petition for Writ of Certiorari* should be denied.

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